UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GERRIT H.J. MUSTERD, Plaintiff,	:	
v.	:	C.A. No. 17-124M
RHODE ISLAND DEPARTMENT OF HEALTH, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

In September 2009, Plaintiff Gerrit H.J. Musterd confessed to a 2009 murder committed at the request of the owner of the gym where he worked; convicted in 2010, he is serving two consecutive life sentences (as well as other shorter terms) at the Adult Correctional Institutions ("ACI"). State v. Musterd, 56 A.3d 931, 936 (R.I. 2012). On June 2, 2016, he opted to receive a chicken pox vaccine based on what he claims was inaccurate information provided by representatives of Defendant, the Rhode Island Department of Health ("DOH"). He alleges that the vaccine actually contained "Gelatin and Fetal Bovine Serum," which he believes constitute animal by-products that his religion (Islam) bars him from ingesting. Invoking the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.*,[1] as well as the First and Eighth Amendments of the Constitution based on 42 U.S.C. § 1983, his complaint asserts that DOH owed all inmates, including him, the duty to establish a protocol to

[1] Plaintiff actually cited to the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, which was held unconstitutional as applied to the states in 1997. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761-62 (2014) (citing City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal-state balance")). Mindful of the obligation to read *pro se* complaints with leniency, Haines v. Kerner, 404 U.S. 519, 520 (1972), I have analyzed DOH's motion as if the complaint had invoked RLUIPA, which Plaintiff clearly intended. See Walker v. Wall, No. CA 13-156-M, 2013 WL 2368863, at *1 n.5 (D.R.I. May 29, 2013) (prisoner cannot assert RFRA claim against state actors; RLUIPA is proper vehicle to challenge burden on religious exercise).

inform regarding the impact of a vaccine or medication on every potentially relevant religious doctrine.

Pending before the Court for report and recommendation is DOH's motion to dismiss Plaintiff's complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 13. Instead of filing an opposition to the motion, Plaintiff responded with a motion requesting the appointment of counsel.[2] ECF No. 15. For reasons explained below, I recommend that the motion to dismiss be granted.

I. Factual Background

On May 27, 2016,[3] a memorandum was posted advising inmates of a chicken pox[4] outbreak at the ACI within the building (Maximum Security) where Plaintiff was then confined. ECF No. 1 at 5, 13. On May 31, 2016, two DOH employees came to the ACI to provide information about the disease and the chicken pox vaccine, which was to be offered to all inmates in the affected area. ECF No. 1 at 5, 13. After an informational session, each inmate was afforded an opportunity to ask individualized questions. ECF No. 1 at 5, 13. Plaintiff, who

[2] That motion is also pending before me; it was referred for determination and is addressed separately in a memorandum and order that issued today.

[3] Plaintiff's complaint has a type-written page, ECF No. 1 at 5, and several handwritten pages, ECF No. 1 at 13-19. These have slightly inconsistent dates for some of the events material to the claim; for example, on page 5, the date for the memorandum alerting inmates to a chicken pox outbreak is May 22, while on page 13, it is May 27. Since the difference is not pertinent to the viability of the claim, I resolve the inconsistencies by relying on the handwritten version, which is more detailed and clear.

[4] The DOH website is referred to by Plaintiff in his complaint. ECF No. 1 at 15. Accordingly, this Court may consider it in connection with this motion. Jorge v. Rumsfeld, 404 F.3d 556, 559 (1st Cir. 2005). According to information posted on the website, chicken pox can cause people to become so sick that they need to be hospitalized and can also cause death. State of Rhode Island Department of Health, http://www.health.ri.gov/diseases/vaccinepreventable/?parm=19 (last visited Aug. 29, 2017). Much of the information on the DOH website links to the United States Centers for Disease Control and Prevention ("CDC"), which has more detailed information, including that chicken pox is a very contagious disease that can be serious for persons older than twelve years of age or with a weakened immune system. Centers for Disease Control and Prevention, https://www.cdc.gov/chickenpox/about/complications.html; https://www.cdc.gov/chickenpox/hcp/high-risk.html (last visited Aug. 29, 2017). Thus, an outbreak in an adult male prison can be a very serious matter. Indeed, the failure to vaccinate a prisoner itself can support a viable claim. Hart for Jaramillo v. Corr. Corp. of Am., No. 2:11-CV00267-MCA-WPL, 2014 WL 12689319, at *11 (D.N.M. May 6, 2014).

is a Muslim, and two other Muslim inmates, asked the DOH employees giving the presentation if there were any animal byproducts, especially "pork or porcine," in the vaccine. ECF No. 1 at 5, 13. Plaintiff told them that, as a Muslim, he could not allow animal by-products to be injected into his body.[5] The DOH employees responded, "no," explaining further that it has an egg-shell base. ECF No. 1 at 5, 13-14. On June 1, 2016, all inmates were sent to have blood samples taken in connection with the administration of the vaccine and, on June 2, 2016, the DOH returned to administer the vaccine. ECF No. 1 at 5, 14. Three inmates declined to be vaccinated – one because he was undergoing chemotherapy and two based on their religious beliefs as Muslims. ECF No. 1 at 14-15. The rest, including Plaintiff, received the vaccine. ECF No. 1 at 5, 14.

Plaintiff claims that he discussed the vaccine later with his nephew who researched the chicken pox vaccine ingredients on the DOH website. ECF No. 1 at 5, 15. The nephew advised Plaintiff that DOH's website indicates that the chickenpox vaccine contains gelatin and fetal bovine serum. ECF No. 1 at 5, 15. The Court's review of the DOH website confirms that it links to CDC publications containing this information. See "Vaccine Excipient & Media Summary," https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/B/excipient-table-2.pdf (last visited Aug. 29, 2017) (confirming Varicella (chicken pox) vaccine contains hydrolyzed gelatin and fetal bovine serum). Plaintiff alleges that it is a violation of his religious beliefs to have such animal byproducts/enzymes injected into his body. ECF No. 1 at 5, 16-18 ("[I]nject[ion] with non-halal animal byproducts, and more so with a pork/porcine product is one of the most servere [sic] negative experiences in my religion, an impurity of the highest sort that

[5] This statement is drawn from the affidavit attached to Plaintiff's reply to DOH's opposition to his motion for appointment of counsel. ECF No. 23-1 at 1. Mindful of the need to read the pleading leniently, I include it in the factual recitation as if it were stated in the complaint.

I knowingly have to live with."). Based on this injury, he seeks money damages in the amount of $100,000 and punitive damages of $100,000. ECF No. 1 at 18.

II. Standard of Review

In considering a motion to dismiss pursuant to a Fed. R. Civ. P. 12(b)(1), the Court must credit the pleaded factual allegations as true and draw all reasonable inferences from them in the nonmoving party's favor. Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001). To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the complaint must give the defendant fair notice of what the claim is and the grounds on which it rests, and allege a plausible entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007). The plausibility inquiry requires the Court to distinguish "the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012). The Court must then determine whether the factual allegations are sufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (quoting Iqbal, 556 U.S. at 678) (internal quotation marks omitted). The complaint should not be read "too mechanically"; rather, review should be holistic with a heavy dose of common sense. Rodriguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283 (1st Cir. 2014).

In considering a motion to dismiss a prisoner's claim that his constitutional rights have been violated, the court must be guided by the principle that, while "prison officials are to be accorded substantial deference in the way they run their prisons, this does not mean that we will rubber stamp or mechanically accept the judgments of prison administrators." Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 40 (1st Cir. 2007). "Prison walls do not form a barrier separating

prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84 (1987). Also critical is that the Court remain mindful that a *pro se* complaint is held to a less stringent standard than one drafted by a lawyer and is to be read with an extra degree of solicitude. Haines v. Kerner, 404 U.S. 519, 520 (1972); Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991). Nevertheless, "a reviewing court is obliged neither to credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation, nor to honor subjective characterizations, optimistic predictions, or problematic suppositions." United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir. 1992). The Court's "duty to be 'less stringent' with *pro se* complaints does not require [it] to conjure up unpled allegations." McDonald v. Hall, 610 F.2d 16, 19 (1st Cir. 1979).

This motion cannot be summarily granted simply because Plaintiff filed a motion for appointment of counsel in lieu of an opposition. Vega-Encarnacion v. Babilonia, 344 F.3d 37, 41 (1st Cir. 2003) ("If the merits are at issue, the mere fact that a motion to dismiss is unopposed does not relieve the district court of the obligation to examine the complaint itself to see whether it is formally sufficient to state a claim."). Despite the lack of a formal opposition, the Court must still determine whether the complaint states a legally sufficient claim.

III. Analysis

As described in Plaintiff's complaint, the Department of Corrections ("DOC") deployed a prudent and appropriate response to the outbreak of a potentially serious disease by calling on DOH to come into the ACI and set up a procedure for vaccination that included an information session with an opportunity for individualized questions; a screening based on blood sampling; and the opportunity to opt-out of the vaccine, including for religious reasons. The delay of almost a week between the information session and the administration of the vaccine afforded

inmates time to seek counsel if they had concerns about whether accepting it would transgress a religious principle. State officials stumbled, according to Plaintiff, only in that the two DOH presenters at the informational session provided an inaccurate answer in response to a question about animal by-products. With the correct information publicly posted on DOH's website, fairly read, the complaint describes a single incident of negligence by two specific state actors. The fact that the other two Muslims in the group opted out on religious grounds confirms that DOC's protocol, as implemented by the DOH, was appropriately accommodating to religious objections to the vaccine.

In addressing this motion, I assume the sincerity of Plaintiff's religious abhorrence of an injection containing animal by-products. Nor is there any question that one of the chicken-pox vaccine ingredients that can be found on the link on the DOH website, gelatin,[6] is an ingredient that is recognized as potentially causing issues for persons of Muslim or Jewish faith. See Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1240 (D.C. Cir. 2013), vacated on other grounds, 134 S. Ct. 2902 (2014) (citation omitted). For example, in Robinson v. Children's Hospital Boston, the court considered a claim by a Muslim hospital worker who refused a mandatory influenza vaccine, among other reasons, because it might have pork by-products; her claim was rejected because she was offered a non-gelatin form of the vaccine. C.A. No. 14-10263-DJC, 2016 WL 1337255, at *3 (D. Mass. Apr. 4, 2016); cf. Vaccine Knowledge Project, http://vk.ovg.ox.ac.uk/vaccine-ingredients (last visited Aug. 29, 2017) (Muslim leaders and scholars disagree regarding whether porcine gelatin is halal or whether it

[6] No cases were found that considered the religious consequences of fetal bovine serum as an ingredient in a medication or a vaccine.

may be used in cases of necessity).[7] Thus, the Court accepts that the failure of the two DOH employees to name gelatin and fetal bovine serum as ingredients in their response to Plaintiff's question about animal by-products is potentially actionable. The operative issue is whether it states a claim for damages under § 1983 or RLUIPA.

A. Section 1983

Starting with § 1983, the Court must examine the complaint for plausible facts sufficient to establish that Plaintiff suffered a deprivation of "rights, privileges or immunities secured by the Constitution and laws" of the United States and that the act or omission causing the deprivation was committed by a person acting under color of law. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988); Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997). The complaint founders on the lack of the first element, a constitutional deprivation. Baker v. McCollan, 443 U.S. 137, 140 (1979). Before explaining why, I pause to identify a threshold flaw that fatally taints Plaintiff's § 1983 claim: he is seeking only money damages and has sued only DOH. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); Jones v. State, 724 F. Supp. 25, 28 (D.R.I. 1989) ("Based on the Supreme Court's holding in Will, it is clear that neither the State of Rhode Island nor any of its officials acting in their official capacities, are 'persons' that can be held liable under § 1983."). The § 1983 claims in the complaint are subject to dismissal for this reason alone.[8]

[7] Because the second source cited in this string is not taken from a published decision or from any source referenced by Plaintiff in his complaint, it is not considered in the Court's legal analysis of the motion. Rather, it is mentioned only for informational purposes to benefit the reader.

[8] The Court notes that, buried in the body of the complaint (but missing from the caption), Plaintiff named two individual employees of DOH and checked boxes indicating his intent to join them both in their individual and official capacities. ECF No. 1 at 3. However, neither has been served and joined; more importantly, the pleading contains no plausible facts linking either of them to the events giving rise to the claims. While a damage claim against a state actor in his or her individual capacity might be viable, subject to the defense of qualified immunity,

1. First Amendment

It is well settled that the one-time exposure of a Muslim inmate to pork products through the error or negligence of a state actor does not state a claim of constitutional proportions actionable under § 1983. For example, in Johnson v. Varano, an inmate was told he was being served a beef and cheese hot pocket, when it actually was a ham and cheese hot pocket. No. 714 C.D. 2010, 2011 WL 10843816, at *1 (Pa. Commw. Ct. Mar. 9, 2011). Noting that this was a single and isolated mistake, the court held that "a single incident of being inadvertently served pork does not deprive a Muslim of the right to the free exercise of his faith" and dismissed the complaint for failure to state a § 1983 claim. Id., at *6. Similarly, in Johnson-Bey v. Indiana Department of Corrections, the inmate plaintiffs claimed that the staff of Aramark, the private company responsible for the food, had mistakenly served pork for lunch. 668 F. Supp. 2d 1122, 1128 (N.D. Ind. 2009). In granting the defendant's motion to dismiss, the court held that "the mere fact that on one occasion their meal trays inadvertently contained a pork product demonstrates, at most, negligence on the part of [the] food service personnel" and that "[n]egligence generally states no claim upon which relief can be granted in a section 1983 action." Id. at 1128-29; see Gallagher v. Shelton, 587 F.3d 1063, 1070 (10th Cir. 2009) (affirming dismissal of complaint alleging failure to properly wash kosher utensils and that request for accommodation not approved until after religious holiday passed; "[t]aking these allegations as true, defendants' actions were, at most, isolated acts of negligence, not pervasive violations of . . . right to free exercise of religion . . . an isolated act of negligence would not violate an inmate's First Amendment right to free exercise of religion.").

Walker, 2013 WL 2368863, at *3, this complaint has sued only DOH and seeks only $200,000 in compensatory and punitive damages; therefore it must be dismissed pursuant to Will.

In this district, Judge Selya dismissed for failure to state a claim a complaint that alleged interference with First Amendment rights from "a full menu of lingering commensal suspicions," including the occasional appearance of pork on the tray – "[t]here is nothing to suggest that these occurrences are other than episodic and unintentional (if negligent)" and that therefore "[t]he prisoner's complaint as to interference with his First Amendment rights is far too attenuated to be swallowed whole." Chase v. Quick, 596 F. Supp. 33, 34-35 (D.R.I. 1984). Based on the same reasoning, I find that Plaintiff's First Amendment claim fails to state a claim and recommend that it be dismissed.

2. Eighth Amendment

Focusing separately on the view from the vantage of the Eighth Amendment[9] does not yield a better result for Plaintiff. Ever since the passing of the Bill of Rights, courts have derived from the Eighth Amendment's text the principles that set the bar for the minimal medical treatment that prisoners must be afforded. See Perry v. Roy, 782 F.3d 73, 78 (1st Cir. 2015); Kosilek v. Spencer, 774 F.3d 63, 82 (1st Cir. 2014) (en banc). To transgress the Eighth Amendment, medical care must be "so inadequate as to shock the conscience" and prison officials must act with such "deliberate indifference" to serious medical needs as to rise to the level of "purposeful intent." Perry, 782 F.3d at 79 (citing Estelle v. Gamble, 429 U.S. 97, 105-06 (1976)). Ordinary negligence is insufficient to establish a constitutional violation. Kosilek v. Spencer, 740 F.3d 733, 775 (1st Cir.), on reh'g en banc, 774 F.3d 63 (1st Cir. 2014).

As described in the complaint, the medical care provided to Plaintiff and other inmates in Maximum Security appears to have been delivered appropriately and with thoughtful and respectful consideration for individualized concerns, including the religious scruples of the

[9] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

affected inmates. At most, Plaintiff alleges ordinary negligence by the two DOH employees. The complaint contains nothing that is conscience-shocking and certainly no suggestion of purposeful intent to injure Plaintiff or any other inmate. Indeed, the opposite appears nearer the fact. In addition, Plaintiff's Eighth Amendment claim founders on his option to refuse the vaccine, as did two of his coreligionists; the consequences of voluntary conduct cannot state an Eighth Amendment claim. Legate v. Livingston, 822 F.3d 207, 210 (5th Cir. 2016), cert. denied sub nom., Legate v. Collier, 137 S. Ct. 489 (2016), reh'g denied, 137 S. Ct. 1139 (2017). To the extent that it is grounded in an Eighth Amendment violation, I recommend that the complaint be dismissed for failure to state a claim.

B. RLUIPA

Under RLUIPA, a claimant must show that the state has instituted a policy that substantially burdens his exercise of religion; once this burden is satisfied, the state must show that its policy (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc-1(a); LeBaron v. Spencer, 527 F. App'x 25, 28-29 (1st Cir. 2013) (per curiam); Harris v. Wall, 217 F. Supp. 3d 541, 554 (D.R.I. 2016). Because of the "least restrictive means" requirement, the Act affords greater protection for religious exercise "than is available under the First Amendment." Holt v. Hobbs, 135 S. Ct. 853, 859-60 (2015).

The first problem with Plaintiff's RLUIPA claim is that RLUIPA does not support a claim for money damages, which is all that he is seeking. Van Wyhe v. Reisch, 581 F.3d 639, 655 (8th Cir. 2009), cert. den. sub nom., Reisch v. Sisney, 560 U.S. 925 (2010), cert. den., 563 U.S. 969 (2011) (state's sovereign immunity bars suit for monetary damages under RLUIPA); Cryer v. Spencer, 934 F. Supp. 2d 323, 333 (D. Mass. 2013) (no monetary damages under

RLUIPA for either personal or official capacity claims); Vangel v. Aul, C.A. No. 15-43L, 2015 WL 5714850, at *5 (D.R.I. June 19, 2015), adopted, No. CA 15-43L, 2015 WL 5714855 (D.R.I. Sept. 29, 2015) (same). Based on these authorities, I find that RLUIPA does not support Plaintiff's claim for damages and that the RLUIPA aspects of the complaint should be dismissed.

Viewed substantively, the RLUIPA claim fails because the complaint lacks a plausible allegation of a policy substantially burdening religion. To the contrary, Plaintiff alleges that prison authorities afforded him the voluntary choice to refuse a vaccine on religious grounds and that the other Muslims opted out for religious reasons. The actionable conduct is the error of the two DOH employees who gave an inaccurate response to Plaintiff's question about the ingredients. While such a mistake may inflict an injury, it does not amount to a "substantial burden" on Plaintiff's ability to practice his religion. Based on the foregoing, I recommend that his RLUIPA claim be dismissed.

IV. Conclusion

Based on the foregoing, I recommend that DOH's motion to dismiss (ECF No. 13) be granted. Because Plaintiff is *pro se*, I further recommend that this Court provide him with thirty days from the adoption of this report and recommendation to file an amended complaint if he wishes to do so. Brown v. Rhode Island, 511 F. App'x 4, 5 (1st Cir. 2013) (per curiam). If he fails to do so, or if the amended pleading still fails to state a claim, the case should be dismissed.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to

appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
August 29, 2017